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THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION
REPORT ON THE UNITED KINGDOM
by
David Edward, Richard McAllister, Robert Lane

Badia Fiesolana, San Domenico di Fiesole (FI)

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European University Institute

Badia Fiesolana

50016 S. Domenico di Fiesole (FI)

Italy

The European Policy Unit

The European Policy Unit, at the European University Institute, was created to further three main goals. First, to continue the development of the European University Institute as a forum for critical discussion of key items on the Community agenda. Second, to enhance the documentation available to scholars of European affairs. Third, to sponsor individual research projects on topics of current interest to the European Communities. Both as in-depth background studies and as policy analyses in their own right, these projects should prove valuable to Community policy-making.

In October 1984, the EPU, in collaboration with the University of Strasbourg and TEPSA, organised a conference to examine in detail the Draft Treaty Establishing the European Union. This Working Paper, presented at the conference and revised in light of the discussion, will appear in book form later in 1985 along with other studies of the Draft Treaty.

Further information about the work of the European Policy Unit can be obtained from the Director, at the European University Institute in Florence.

INTRODUCTION

This Report is in three parts. Part I deals with the question whether, assuming that the necessary political will exists, there are any strictly legal or constitutional obstacles to the United Kingdom's accession to the European Union. Our conclusion is that there are no such obstacles.

In Part II, we consider whether the political will exists. Our conclusion is that, for the time being at any rate, it does not. The United Kingdom government has not yet taken a policy decision on the Draft Treaty, either in principle or in detail, but it is already reasonably clear that the government's position is likely to be unfavourable. Apart from the Liberal-SDP Alliance we have been unable to identify any substantial body of opinion, in Parliament or in the country generally, which favours the proposal or is even prepared to take it seriously.

Part II also considers the ways in which the Draft Treaty might reach 'the political agenda' in the United Kingdom.

In Part III, we try to explain the negative character of British attitudes, and we express some reservations of our own about the Draft Treaty.

One of the misfortunes of those who comment on European affairs in Britain is that they run the risk, if they appear enthusiastic, of being called "euro-fanatics" at home or, if they do not, of being called "anti-communautaire" elsewhere in Europe. Our Report may appear negative in tone and may therefore disappoint those who look for a more positive response from the United Kingdom. But we feel that it is more important for us to state the problems, as we see them, frankly and realistically than to refrain from critical comment as a kind of personal pledge of loyalty to the Community. We believe that the cause of European Union will not be promoted, and may indeed be hindered, by sweeping the difficulties under the carpet.

PART I: LEGAL AND CONSTITUTIONAL IMPLICATIONS

For the United Kingdom, the Draft Treaty establishing the European Union, like the Treaties of Paris and Rome, presents few problems of accession or incorporation. The constitutional difficulties, stemming from a largely unwritten constitution and the doctrine of the absolute supremacy of Parliament, concern entrenchment of the Treaty as an autonomous and paramount legal order.

The power to enter into the European Union

It is almost sufficient to say that, in relation to external affairs, the United Kingdom remains a monarchy. The external treaty-making power is a prerogative right of the Crown, which cannot be impugned within the Kingdom in or by the courts [1]. As a corollary of the doctrine of parliamentary supremacy, however, treaties are not directly applicable within the Kingdom, and the courts cannot take judicial notice of them until they are embodied in statutes enacted by Parliament. It has recently been indicated that English courts will recognise principles of customary international law as forming part of English law [2], but this does not include treaty obligations; for these, legislation is necessary.

The legal situation was best summed up by Lord Atkin, sitting in the Judicial Committee of the Privy Council (then the "Supreme Court" of the British Empire):

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve the alteration of law they have to run the

risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.[3]

Thus the power of accession to the European Union is exclusively that of the Crown (i.e., de facto, the government) independent of Parliament. But the power of implementation, or of incorporation, belongs exclusively, in turn, to Parliament.

The power to implement the European Union

The honouring of treaty obligations in the United Kingdom is both facilitated, and at the same time imperilled, by the doctrine of Parliamentary supremacy. According to that doctrine, there is no law which Parliament cannot enact, or repeal, in its ordinary legislative capacity; it can make or unmake any law whatsoever.

In elucidating the doctrine, Dicey formulated three central propositions:

First, there is no law which Parliament cannot change ... acting in its ordinary legislative character. A Bill for reforming the House of Commons, a Bill for abolishing the House of Lords, a Bill to give London a municipality, a Bill to make valid marriages celebrated by a pretended clergyman, who is found after their celebration to be not in orders, are each equally within the competency of Parliament, they each may be passed in substantially the same manner, they none of them when passed will be, legally speaking, a whit more sacred or immutable than the others, for they each will be neither more

nor less than an Act of Parliament, which can be repealed as it had been passed by Parliament, and cannot be annulled by any other power. Secondly, there is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and those laws which are fundamental or constitutional Thirdly, there does not exist ... any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except, of course, its being repealed by Parliament.[4]

Herein lies both the strength and the weakness of the United Kingdom constitution. The law recognises no difference between constitutional laws, organic laws or ordinary laws. There is no hierarchy of norms; no law is "a whit more sacred or immutable" than another. A Bill seeking the most fundamental constitutional change encounters no greater procedural obstacles than does one seeking to unite two or three English parishes. Indeed, a statute implementing the European Union could commence its parliamentary progress as a private member's bill, however unlikely that may be.

Nor are there substantive difficulties: if Parliament is supreme, it may delegate, or disable itself of, any particular power or powers it wishes. Such is the design and force, for the present Communities, of Section 2 of the European Communities Act 1972, which incorporated the Treaties of Paris and Rome [5]. But owing to the absence of any distinction between different types of laws, there exists in the United Kingdom constitution no means of entrenchment of legal norms. This is what Lord Scarman calls "the helplessness of the law in the face of the legislative sovereignty of Parliament" [6] and it constitutes the apparently insurmountable problem for those who seek to draft and entrench a British Bill of Rights [7].

The European Communities Act successfully incorporates the Community legal order in the United Kingdom for the time being but, at least according to the traditional theory of British constitutional law, it does not and cannot entrench it. The theoretical possibility of abrogation of the Community norm, by simple parliamentary majority, remains constitutionally valid whatever the breach of Community law, and the threat of such a course from some British quarters is one of the causes of continued discomfort in viewing the commitment of the United Kingdom to the Communities.

The rigours of strict adherence to the doctrine of Parliamentary supremacy have been mitigated, in the view of some judges, by British membership of the present Communities. Lord Denning, Master of the Rolls, suggested in an obiter dictum in 1979 that the doctrine of implied repeal (lex posterior derogat lege priore) no longer operates in English law to nullify Community obligations in the face of unintentionally inconsistent subsequent statute law; for Parliament to abrogate the Community treaties it must do so intentionally and expressly [8]. Implied support for this proposition is indicated in a more recent judgment of Lord Diplock in the House of Lords [9]. But it seems to be the case that, if Parliament chose to legislate explicitly, the courts could not refuse to give effect to its will. So long as parliamentary sovereignty is indestructible by legislation or by any other means, constitutional theory can accommodate no more.

There is one possible procedure, as yet not fully tested in the courts, by which laws may become entrenched in the United Kingdom. It was not attempted in the enactment of the European Communities Act, but might be considered if the government sought to implement the European Union. What are called "manner and form" statutes impose procedural restraints upon the future activities of Parliament in the manner prescribed by the statute. The area of sovereign power, as distinct from procedure, remains limitless; but by this theory, sovereignty is divisible between Parliament as ordinarily constituted and Parliament as constituted under the entrenched provisions of the manner and form statute.

Thus, according to this theory, Parliament could by statute incorporate the obligations of the European Union within the domestic system of the United Kingdom, and provide within the statute itself that it may not be amended or repealed save by recourse to some specific procedure - say, a weighted majority in Parliament. Any ordinary (purported) statute subsequently seeking to abrogate the Union by repeal of the incorporating statute (or parts of it) would then be a nullity.

There has been some judicial recognition of manner and form restraints, particularly in the Commonwealth [10], although some opinion denies their existence [11]. There is also some debate as to what may legitimately constitute such a restraint. Nevertheless, such a device might fruitfully be incorporated into any enabling statute for the European Union, and if successful would more closely align British constitutional adherence to Community norms to that of other member states.

Subject to that, the question of United Kingdom accession to the European Union is ultimately a question of political reality rather than constitutional or legal theory. It would depend on the political will of the government of the day and the size of its Parliamentary majority. The risks for a government seeking to accede to the Union and to incorporate its provisions in domestic law are illustrated by the history of accession to the present Communities.

The election manifesto of the Conservative Party in 1970 and, after the election, the Conservative Government's White Paper, "The United Kingdom and the European Communities", contained a commitment to entry if the terms were acceptable. After negotiation, the government secured a majority of 102 in the House of Commons on a motion approving the principle of entry. On the Second Reading of the European Communities Bill, however, the government's majority was reduced to 8, and the majority on Third Reading was only 17. Thus, notwithstanding accession, the obligations arising from accession were incorporated in domestic law by, but only by, the slimmest of margins.

Finally, we should briefly mention the theoretical possibilities of legislation by Private Member's Bill or by a Bill introduced in the House of Lords rather than the House of Commons.

The government could not be compelled, against its will, to accede to the Union by a Private Member's Bill; nor would a Private Member's Bill seeking to incorporate the law of the Union in domestic law have any prospects of success against the will of the government. The same applies to a Bill introduced in the House of Lords where the government does not necessarily command a majority, since the legislation would have to pass the Commons. The only usefulness of a Private Member's Bill would be as a means of stimulating debate.

It is possible that, if the government were anxious to legislate and were uncertain of its majority in the House of Commons, a European Union Bill would be introduced first in the House of Lords, where it might receive more sympathetic consideration, so blunting the edge of opposition in the House of Commons. This is not probable. In the absence of a clear majority in the House of Commons, a government would not be likely to attempt to legislate at all.

PART II: SOCIO-POLITICAL ASSESSMENT

This part of the report is divided into seven sections. Section 1 sets out the public reactions of government Ministers and, in summary form, the points made to us in informal discussion with government sources. Section 2 deals with the political (as opposed to strictly legal) difficulties for a government seeking to promote a Treaty for European Union, and with the ways in which the present Draft Treaty might reach the political agenda in Parliament. Section 3 deals with attitudes of the major UK political parties. It discusses in turn: the present attitudes of the four main parties; the likelihood of any significant changes of attitude in the near future; and the relationship of the views of MEPs on the one hand, and those of MPs and home-based party research departments and activists on the other. Section 4 sketches the views, insofar as they have been formulated, of leading interest groups. Section 5 deals with the European Movement. Section 6 comments on the attitudes of the media. Section 7 deals with public opinion as a whole.

Section 1: The Government

(a) Public Attitudes:

At the time of writing, the United Kingdom government had not adopted a definite policy on the Draft Treaty. But a good indication of the government's initial reaction has been given by Mr Malcolm Rifkind, Minister of State at the Foreign and Commonwealth Office and U.K. representative on the ad hoc ('Dooge') committee on institutions of the Community set up at the Fontainebleau summit.

Answering a Parliamentary Question in the House of Commons on 27 June 1984, Mr. Rifkind said :

Although there are some aspects of the Spinelli report to which we do not object, we have made it clear that there are some

proposals that we cannot support. I draw special attention to the proposal to phase out the national veto after 10 years and the proposal to increase the powers of the European Parliament. We have made it clear that those are the two main recommendations that we cannot support. [12]

In answer to other Parliamentary Questions, both Mr Rifkind and the Prime Minister have stressed the scope available under the existing treaties :

-The Prime Minister : We are not convinced of the need for a new treaty since the existing treaties provide plenty of scope for the further development of the Community. [13]

-Mr. Rifkind : Our view is that the existing treaties provide for the further development of the Community and we are not persuaded of the need for a new treaty. [14]

At the time of the first debates in the European Parliament on the new treaty (September 1983), Mr Rifkind gave a yet more general view of the government's approach :

The European Parliament has focussed our attention on the issue [how the Community can be improved] ... in its debate on [the Spinelli] report which argues for a more elaborate Community structure with greater powers for its central institutions.

That is not our approach. To us, institutions must be subservient to policies. Closer co-operation should not be forced but must grow out of practical ways in which as a Community we can work together for our common good. Substance and reality must come before form. [15]

He went on to list some of the concrete areas where 'working together can pay real dividends'.

(b) Informal indications:

The public pronouncements quoted above show that the United Kingdom government is likely to be opposed in principle to two of the fundamental features of the Draft Treaty: the phasing out of the veto and the increase in the powers of the Parliament. In informal discussion, other areas of concern have been identified,

some of them no less fundamental. We set out the points as they have been made to us in summary form:-

(1) Relationship with the Community Treaties: There is nothing to prevent the parties to the Community Treaties agreeing to a new Treaty which would supersede the existing treaties. But such agreement must be unanimous. The provision in the Draft Treaty whereby it would take effect once ratified by Member States representing two-thirds of the population of the Community is contrary to international law. (Articles 41 and 54 of the Vienna Convention on the Law of Treaties.)

(2) Competence: Articles 11 and 12 have the effect of making it considerably easier than it now is to give competence to the union rather than proceed by cooperation among the Member States. It is not clear what sort of majority in Council would be required to make the step from cooperation to common action.

(3) Appointment of the Court of Justice: Article 30 gives the Parliament the function of appointing half of the members of the Court, the other half being appointed by the Council. Not only would this destroy the convention that the Court of Justice is composed of judges representing each of the national law systems of the Community, but it is inherently objectionable for the legislature to appoint the judiciary. There is nothing comparable in the procedure for appointment of international tribunals. The nearest parallel is the nomination of candidates for judges on the European Court of Human Rights by the national groups in the Council of Europe Assembly - but those nominations are in effect made by the States parties. It is an almost universal constitutional practice in domestic law for the executive to appoint the judiciary, which, once appointed, is entirely independent. This provision would politicise the appointment of the Judges in a most undesirable way.

(4) Legislation: The effect of Article 38(4) seems to be that a Council draft amended by the Commission and adopted by the Parliament will pass into law unless the Council can muster a qualified majority to reject it.

(5) Budget: The effect of Article 71(2) is that the procedure for adopting organic laws applies to amendment of the present system of Own Resources or creation of any new system to replace it. That gives the Parliament a substantial role in a decision which at present is in the hands of the Council and Member States (on a proposal by the Commission) under Article 201 EEC. Article 72 effectively abolishes the present distinction between obligatory and non-obligatory expenditure. Article 76 changes the present budgetary procedure and, as a result of the change brought about by Article 72, gives Parliament powers in relation to obligatory expenditure far beyond what it now has. By Article 76(2)(f) Parliament may on second reading reject by a qualified majority amendments adopted by the Council. This gives Parliament the last word on all budgetary issues and, in effect, the power to force the Member States to increase domestic taxation.

(6) The Commission: In addition to its role in tabling amendments to legislation under Article 39, Article 40 gives the Commission the exclusive power to issue regulations and decisions required for the implementation of laws. It only has to inform Parliament and the Council. The Commission is also given the right to oppose amendments approved by Council or by Parliament to the budget on its first reading, such opposition having the result that the relevant arm of the budgetary authority must take a fresh decision by qualified majority on second reading. On the other hand, the Commission loses its exclusive right to initiate legislation: by Article 37(2) it must introduce a draft if asked to do so by Parliament or Council, or if it fails to do so, Parliament or Council may introduce a draft.

(7) Judicial Review: Article 43 extends the powers of review by the ECJ considerably. One point (which could be an improvement on the present situation) is that an equal right of appeal and equal treatment is given for all the institutions before the Court of Justice. This would appear to have the effect of giving a right of action against the Parliament, which does not now exist in a number of instances. The Article gives the Court jurisdiction to

impose sanctions on a Member State 'failing to fulfil its obligation under the law of the Union'. Similar power is given to the European Council in cases of persistent violation of fundamental laws, by Article 44. In relation to fundamental laws, under Article 4 the Union is to take a decision on its accession to the European Convention on Human Rights (ECHR) and the UN Covenants. The U.K. government has hitherto strenuously opposed the idea of Community accession to the ECHR and would have similar objections to its accession to the Covenants.

(8) Monetary matters: The Draft Treaty envisages radical moves towards monetary union under its provisions on the European monetary system and fund. Participation would be obligatory as would the partial election of national reserves to the EMF. The role of the ecu would be expanded to that of a reserve currency.

(9) Defence: The objectives of the Draft Treaty refer to security and defence matters. These are not elaborated in any coherent manner but there are reference to cooperation in fields ranging from arms sales, MBFR and disarmament to general security (Article 9). These aims are unlikely to be acceptable to all the Member States.

(10) Forms of Cooperation: The Draft Treaty proposes two levels of combined action by Member States: common action and cooperation, the former referring to areas where the Union has exclusive competence. Political cooperation itself is implicitly covered by cooperation but both headings remain obscure at key points in the Draft Treaty.

(11) General: The Draft Treaty attempts to codify a far wider range of activities than is currently covered by the Community Treaties but without sufficient detail to make for consistency or clarity. In addition, it allows for operational practices to be decided by institutions and other bodies at a later stage. This presumably means that the ultimate power to determine the shape of Union Institutions would rest with the Parliament.

Section 2: Parliament:

We have suggested in Part I that when a government has made up its mind and has a reasonable majority in the House of Commons, it can do almost whatever it wishes. However, in the 1970s and 1980s, it has become less clear that this is so. Situations have arisen where a government has needed to rely on the support or benevolent neutrality of other groups, the 'Lib-Lab Pact' of 1977/78 being one notable example. While this is not in itself unprecedented, the European Community has become a new and separate ideological issue in British politics, and has already been responsible for upsetting what were once thought to be the 'normal' processes of government in the United Kingdom.

It is worth recalling that, after accession in 1973, the issue of membership did not vanish from the political agenda in the United Kingdom: instead, new precedents were set which might be followed again over this or any other proposal for European Union. In particular, in 1974 the Labour Party committed itself in its election manifesto to renegotiate the terms of entry and to hold a referendum on them. After the election the Labour government declared itself bound by the result of the referendum. This, it has been held [16], had the effect of usurping the sovereignty of Parliament. It certainly makes it even more difficult to define with any precision where the law stops and politics begin !

It may well be that, even if a future government were committed to a treaty for European Union and secured the approval of Parliament, it would now also feel bound to submit to a binding referendum. Thus, government support for accession to a new treaty is still a necessary, but perhaps not a sufficient, condition of accession.

The 1975 Referendum campaign also marked another departure from 'normal' UK practice - this time over collective Cabinet responsibility. Labour Ministers were seen to oppose one another in the

Referendum campaign. Again, this happened after accession had been accomplished by a relatively united (Conservative) Cabinet, relatively sure of its Commons majority. The events of 1975 were a way of getting the Labour Party 'off the hook' of its own deep divisions on the issue: but such problems could recur over European Union, whatever the party of government.

As to the ways in which the Draft Treaty now proposed might be brought to Parliament's attention, the following possibilities exist. (It is important to emphasise that they are not equivalent to one another, in the sense that, if followed, they would lead to the same result. Some might be inappropriate in the circumstances, and more than one might be followed concurrently. Except in the last case, we concentrate on what might be done in the House of Commons.)

(i) Government motion. We think this unlikely, unless considerable pressure were generated from the Dooge Committee and/or there were evidence of consensus on modification of the Draft Treaty such as to render it more to the Government's liking.

(ii) Opposition motion (on an 'Opposition Day'). This would have to be thought to have political benefits for the Opposition outweighing any embarrassing revelation of differences. The Liberals have one such day at their disposal, half of which they have made available to the SDP.

(iii) Private Member's (Monday or Friday) Motion. This would normally be easy for the Government to neutralise or defeat. If taken in Private Members' time, whatever was said would not have the status of definitive consideration of the text of the Draft Treaty by the House.

(iv) A 'Ten Minute Rule' Bill. This is usually regarded as a useful method of ventilating the ideas which such a Bill contains; it is perhaps not a likely channel for consideration of the Draft Treaty.

(v) Questions. See the previous Section.

(vi) Consideration by a Select Committee of the House of Commons. Potentially, three Committees might be involved: the European Legislation etc. Committee, the Foreign Affairs Committee, and the Treasury and Civil Service Committee. The terms of reference of the European Legislation Committee are to "consider draft proposals by the Commission of the European Communities for legislation, and other documents published for submission to the Council of Ministers or to the European Council, and to report whether these raise questions of legal or political importance..." etc. At present the Draft Treaty does not come within these terms of reference; but if, for example, it or its substance became a discussion document at a European Council, then it would come within the terms of reference and be a candidate to be recommended for debate, at which stage the government would have to arrange for the House to debate it. A final report of the Dooze Committee would also be a candidate.

Both the Foreign Affairs Committee and the Treasury and Civil Service Committee have shown considerable interest since the latter part of 1983.

(vii) Consideration by the House of Lords Select Committee on the European Communities. The terms of reference of this Committee are different from, and wider than, those of the equivalent Commons Committee: "to consider Community proposals, whether in draft or otherwise, obtain all necessary information about them, and report on those which, in the opinion of the Committee, raise important questions of policy or principle and on other questions to which the Committee consider that the special attention of the House should be drawn...". The Draft Treaty is clearly within the Terms of reference of the Lords' Committee; and the Committee, and individual members of it, have already been involved in deciding how best to proceed, and are at the time of writing (January 1985) involved in further steps.

The Committee is expected to decide in late January or early February 1985 whether to set up an ad hoc Committee on the Draft Treaty ('ad hoc' because the Draft Treaty does not fall neatly into one of the Lords' Sub-Committee categories). Members of the Committee are to visit the Institutional Affairs Committee of the European Parliament in February. EP Members, in turn, will be in the UK in April 1985 as part of their general tour to each national Parliament.

Section 3: The Political Parties

As mentioned in the Introduction, we have been unable to identify any substantial body of opinion in the UK, outside the Alliance parties (Liberals and Social Democrats), which favours the Draft Treaty or is even prepared to take it seriously. A very good indicator of the importance attached by a British political party to a particular issue in any year is its place in the agenda of the Party Conference in September/October. In 1984, even the Liberal Party, the most enthusiastic for the Union, only held a debate on the '1984 Euro Elections'. The motion for debate lamented the party's performance, along with that of its SDP Alliance partner, in the EP elections; and was highly critical of its EP partners in the Federation of European Liberals and Democrats (ELD). There was hardly a mention of the Draft Treaty.

(a) The Conservative Party

As the party of government, having no need to take account of any coalition considerations, the attitude of the Conservatives is crucial for at least the next three years. It is, however, necessary to distinguish 'the government' from the Conservative party at large in the UK; and to distinguish both from Conservative MEPs.

The attitudes of the Conservative Party as a whole have been summarized by the Party's Research Department as follows:

Firstly,

"There is a belief that the time is not ripe for European Union, although this does not diminish the support in principle for the general idea in due course" (underlining added).

Such qualifications speak volumes. The project is firmly in the category of 'not for today' ! Secondly,

"There is the strongly held view that, since the UK has an unwritten constitution unlike most of the rest of our Community partners,... an 'evolutionary' process towards European Union is more desirable than a 'revolutionary' approach (by means of a Treaty)".

Whilst the line of reasoning here may not be obvious, it probably reflects unease that there would be no constitutional 'bulwark' against progressive erosion of UK 'sovereignty'.

Many of these reservations are shared by several Conservative MEPs. This is so despite the votes cast in favour of the Draft Treaty by many of them. (The group voted on 14 February 1984: 22 in favour, 5 abstentions, 6 against, 28 not voting). A free vote was allowed despite a certain amount of resistance to it by Party managers back home. 'Explanations of vote' followed soon after. A fairly typical example of the true meaning of a vote in favour came from Christopher Jackson, MEP :

Undoubtedly some of the ideas in the draft treaty are controversial, for example its recommendations concerning the veto. I was among those who voted for the draft as deserving further discussion yet made clear the importance they attach to the continuation of the veto ...[17]

At the time of the free vote in the EP (14 February 1984) Derek Prag, MEP, explained the EDG's stance thus :

The essential difference within the group - and it is a fair and legitimate difference to anyone who knows the history both of the United Kingdom and of Denmark - is between those who believe that written treaties are necessary in a voluntary union or community of peoples and those who believe in organic development, the evolutionary process, gradualism and pragmatism. [18]

Thus, if there appears to be a degree of ambiguity about Conservative attitudes to the Draft Treaty at present, it is not one which affords much comfort to the Treaty's promoters. Any House of Commons vote on the Draft Treaty will see most Conservatives vote as as they are told by the party managers - reflecting the Ministerial views already quoted. A few would break ranks; rather more might abstain.

(b) The Labour Party

According to a Party Research Officer, the Labour Party has "to the best of my knowledge ... never made a formal statement on the question of European Union". Commenting on the absence of substantial documentation, he added "That might of itself be a significant reflection of the importance attached to the issue by the Labour Party".

There appears to be no great difference between the Party's stance in the EP and its stance at home; and no likelihood of Labour supporting the Draft Treaty. At Community level, in the 1984 Manifesto of the Confederation of the Socialist Parties, Labour entered a reserve stating that it "did not support" the sections on 'Institutional improvements in favour of the EP' and 'An improved financial system'. Labour is also absent from the Annex declaring PSI and PSDI support for the Draft Treaty. [19]

Indeed, Labour's own national Manifesto for the 1984 European elections was careful to leave open the 'withdrawal' option. It stated that

[EEC] rules may stand in the way of a Labour Government when it acts to cut unemployment. It is in this context that we believe that Britain, like all member states, must retain the option of withdrawal from the EEC.

This is of course a careful compromise: but the compromise operates in reverse as well. Those most in favour of 'full-hearted' UK membership of the EC do not wish to expose themselves too far by any open support for the Draft Treaty.

(c) The Liberal Party

The Liberals have been unequivocal in their support for the Draft Treaty. They have, however, no voice in the EP and only a very small voice in the UK House of Commons. From their point of view, much the most promising place in which to fight for a debate on the Draft Treaty is the House of Lords. They have more representatives there (including such 'elder statesmen' as Lord Gladwyn), numerous and often influential SDP allies, and independent 'crossbench' sympathisers. A debate in the House of Lords could be no more than an attempt to 'show the flag', undertaken without any expectation that a majority for the Draft Treaty in the Lords (itself unlikely) could 'shame' the Commons into agreement.

The 'Liberal Programme for Europe' (1983) declared "We have been fully committed to the goal of Political and Economic Union for the peoples of Europe since ... 1958". The document closed by emphasising "the importance of working towards European federation" but, perhaps significantly, it did not mention the Spinelli proposals which were due for debate in the European Parliament immediately after its publication.

The next step was the drafting of the joint Liberal-SDP Alliance Manifesto for the 1984 EP elections. In Chapter VI ('An Effective Democratic Europe') the parties had an opportunity to 'go firm' on the Draft Treaty. They did not. Indeed, one person actively involved in the drafting had the impression that, even at this level of attention and awareness, almost no-one had heard of the Draft Treaty. Chapter VI itself is delphic at crucial points:

We want to streamline the Community's structure and its methods of decision-making. This can be done without changing the Treaties ...

The use of the veto in the Council must be severely restricted ... Alliance MEPs will seek to join with like-minded MEPs ... in the construction of an ever-closer union among the peoples of Europe.[20]

Equally significant was the absence of debate on the Draft Treaty at the Party's Assembly in the late summer of 1984. Attention was focussed instead on the Party's unhappy relations with the ELD, and its delicate relations with the British SDP, to which we now turn.

(d) The Social Democrats

Michael Gallagher of the SDP was the sole Alliance MEP until June 1984. Voting for the Draft Treaty, he said,

I wish to put it beyond doubt that the Alliance is solidly behind the development of European co-operation along the lines set out in this preliminary draft treaty'.

Party sources have indicated, however, that they have been under little pressure so far to justify their position on the Draft Treaty, although they have on occasion been attacked by the Conservatives about it. It has caused some, though not serious, strain in their relations with the Liberals. There is more than a hint of difference in the approaches of some of the SDP's own leaders.

The generally favourable orientation of the SDP should not conceal two qualifications. First, Dr David Owen (now leader of the party) is clearly less enthusiastic about the Draft Treaty than either the Liberals or his own predecessor, Mr. Roy Jenkins. Second, the SDP is not at all likely to expose itself to any political risk, or 'high profile' in favour of the Draft Treaty. It is regarded as a good idea in the long term, but at present as a 'non-starter' in UK terms.

On the veto, the SDP's consistent line has been to argue for reduction rather than abolition; they succeeded in getting this written into the Alliance manifesto. Beyond this, there has been no detailed statement that can be regarded as authoritative since an article by Mr Jenkins in The Guardian in 1982.

Section 4: Interest Groups

(a) The Confederation of British Industry ("CBI"):

The CBI has not, to date, produced any detailed reaction to the Draft Treaty, and does not appear to have plans to do so. Its reactions to parts of the Draft Treaty, and to its general thrust, may be inferred from such documents as the 1983 Conference note, 'Making the EC Work Better: Managing Recovery'; and more especially the short pamphlet issued just before the 1984 EP elections, 'Making Europe Work Better: how MEPs can help British Business'. Under the heading, 'No to a two-tier Community', the CBI says:

...unification of the internal market...must be the major policy objective. Proposals for a Community policy which would divide the Member States into two...are inconsistent with this objective and must be opposed.

And on decision-making :

Better decision-making will not be achieved without moving towards majority voting where the Treaty [of Rome] allows it. Insistence on unanimity for everything blocks progress towards a true common market.'

The CBI's insistence was on thorough consultation in early stages of Community legislation ("There must be no recurrence of the 'Vredeling rabbit' pulled out of a hat ..."). Heavy emphasis was placed on the completion and simplification of the internal market, ending non-tariff barriers and establishing full liberalisation for services. On many individual policy-areas, the CBI said things very similar to the Draft Treaty, but its complete silence on the Draft Treaty itself indicated the CBI view that it should be

possible to accomplish most that is desired through the existing Treaties, with only piecemeal change. There is no indication that the CBI intends to make the Draft Treaty a major issue, or that it is prepared to go to the barricades or push the Government on behalf of it.

(b) The Institute of Directors.

The attitude of the British Institute of Directors very closely parallels that of the CBI and those of other employers' organisations in the Community. In its submission to the incoming Commission [21] (January 1985), the Institute set the achievement of a 'genuine common market' for goods, services and transport as the overriding priority, to be achieved by 1988, and warned of the irreversible shift in the economic centre of gravity to the Pacific rim.

The Institute warned specifically against allowing any talk of a Draft Treaty for European Union to distract from this immediate, practical and priority task. Interestingly, however, the Institute was prepared to envisage suspension of the right of veto in the Council of Ministers, but on proposals "which are clearly designed only to develop the internal market": a formula close to that of the CBI quoted above.

(c) The Trades Union Congress ("T.U.C.")

The TUC has, at the time of writing, not yet discussed the Draft Treaty in General Council, and thus has no formal 'corporate' view. It is clear however, that the TUC has 'no love for Spinelli', though it is quite favourably disposed to certain specific orientations of the Draft Treaty.

The attitudes reported here are therefore those of TUC researchers, who have read the Draft Treaty, rather than its members, most of

whom have not.. They are in favour of retaining 'unanimous voting', i.e. the veto. They are against the grant of additional powers to the EP in general. They do not favour notions of defence and security policy at Union level. They respond 'more positively' to political co-operation, and feel there should be 'more of it', without specifying the mechanics. Co-operative (pluri-national) industrial projects are viewed as 'very important to us', as is the extension of policy in the social field, particularly as concerns workers' rights and conditions. However, they question whether a change in the institutional arrangements is needed to generate the political will to carry through such policies. They note, with dissatisfaction, that the 'primacy of the CAP' is not called into question in the Draft Treaty.

Section 5: The European Movement

We have stressed the striking lack of position of many UK bodies on the Draft Treaty at the time of writing. Much the same could have been said before the referendum on 'renegotiation': the relatively high turn-out of voters was due in no small part to 'propagandising' groups, for and against. The European Movement acted then, and would probably act again, as a main umbrella organisation for those wishing to 'go forward'. It is an inter-party body, drawing support from as wide a spectrum as possible, as is well reflected in its list of office-bearers, patrons and presidents. It is notable, however, that it can count on few prominent Labour figures, mainly from the right of the party.

The European Movement has over thirty 'Associated Organisations', several of which have a degree of influence over policy in one or other of the political parties. It has, more than any other body in the UK, given both prominence and a relatively positive press to the Draft Treaty. (Substantial articles by, for example, Dr Roy Pryce (March-April 1984) and Mr Derek Prag (July-August 1984) have ensured, at least, that none of these Associated Organisations has any excuse for not having considered the Draft Treaty rather fully).

It remains the case that the European Movement to date has not been galvanised into action on behalf of the Draft Treaty. It proved, over the 1975 referendum, a highly effective body once engaged; and it might do so again. Without it, certainly, the Draft Treaty would have much less of an audience and less exposure in the UK.

Section 6: The Media

The British media gave the Draft Treaty their usual, sporadic, attention. This can be gauged from the Press : there were flurries of interest in September 1983 and February 1984 when the votes were due. Even these were mainly confined to the 'quality' newspapers, whose reaction might best be described as darkly sceptical. Later, they ignored it. The popular Press, when it did not simply ignore the Draft Treaty, was scathing.

'Visionary' was probably the commonest of the polite epithets used to describe the Treaty. First, some examples from the Times and the Guardian beginning in September 1983:

The vision...will be one step nearer reality. Except that it will not happen. Not in the next couple of years and probably not for many more years to come.... Tomorrow's proposals...have simply become worthy attempts to keep the idea of unity alive amid the yawns of the public and most politicians.[22]

The draft treaty will probably remain for many years little more than a theoretical nudge in the direction of unity..... National governments...are in no mood for handing over significant powers to a supranational body.[23]

Federal union likely to remain just a vision.[24]

[I]ts chances of being implemented in the foreseeable future are remote in the extreme. The Parliament recognised this in agreeing to send its resolution direct to the 10 national parliaments for consideration, rather than sending it to the

Council of Ministers ... Several countries, including Britain, would certainly veto any proposal which would do away with the right to a veto.[25]

The Economist was a little more positive. Its headline (18/2/84) read

"The EEC speeds up from a snail's pace to a crawl."

If British attitudes are hard to understand, it should not be forgotten that this is the diet on which 'informed' opinion has been fed.

The Financial Times was kinder, but still tended to play down the practical importance and likelihood of implementation of the Draft Treaty. It is perhaps worth quoting at greater length as a fairly accurate reflection of sympathetic but agnostic opinion in the UK:-

The Draft Treaty is a political statement and not a blueprint which puts the Community in imminent danger of fundamental change. Governments are not even obliged to take much notice of it, although it is to be submitted to national parliaments for ratification....

But its actual relevance is more likely to derive from the way it feeds into the growing debate over how to make the Community more effective - or rather, how to preserve it from impotence and disarray....

[T]he draft treaty.....gives some expression to popular demands for a more effective Community.[26]

Section 7: Public Opinion

In the light of the foregoing, it might be expected that public opinion in the UK would be universally hostile to Draft Treaty. Unfortunately, most of the questions posed in leading surveys are not of a form to enable us to say whether this is so or not. The evidence is best described as, first, inconclusive and, second, paradoxical.

As was pointed out by the tireless Mr. Prag, the Eurobarometre poll carried out in October 1983 in the UK, indicated that 70% of those questioned were 'in favour of the unification of western Europe.' Further, this percentage has not dropped much below 60 in the years that the polls have been carried out, whatever the state of opinion at the time about the Common Market. The difficulty with such questions is obvious: they are so vague and high-sounding that to oppose them is akin to opposing virtue. They in no way evaluate views concerning the form and scope of 'union' nor what interviewees would be prepared to forego to attain certain objectives.

It is possible to make much or little, in regard to the Draft Treaty's prospects, of such data as the October 1983 Eurobarometre study (published December 1983). The general picture was a somewhat more positive (or at least less negative) attitude toward the European Community in the UK in 1982 and 1983 (after something of a nadir in 1980/81). This general picture emerges from the three 'basic' questions regularly asked.[27]

Narrowing down to the role of the European Parliament, Eurobarometre indicated middle-of-the-range views in the UK about the present effectiveness of the EP, and a fairly significant shift between April and October 1983 in favour of an increase in its role in future.

Role of EP <u>should</u> be-	April 1983	%	October 1983
More	34		48
Less	27		20
About same	20		17
Don't know	19		15

Again, this question in no way investigated the problems of modality, quid-pro-quo, implied 'costs' and consequences from the UK's point of view. The newly introduced questions in the 1983 survey sought to explore 'what sort of EP for what sort of Europe' - thus edging closer to the issues which the Draft Treaty seeks to address, but still evidence of, at best, an indirect and unreliable

kind. The three questions sought to evaluate: a) the EP's technical function: its powers to control the way the Community functions and the budget; b) its perceived remoteness from people's problems; c) its 'constituent' role - how far the new (post-1984) EP should 'work towards a political union of member countries, with a European Government responsible to the EP'.

In brief, Eurobarometre's findings here were that the UK was third lowest on the 'enhanced control' question, but not by very much; was highest of the 'remoteness from people's problems' question; and was middle-of-the range in degree of positive support for a 'constituent' role for the EP (Yes 60%; No 18%; Don't Know 22%).

Direct elections were perceived as an 'event with important consequences' by 44% of the UK 1983 sample, a modest decline from 47% in the period 1976/78; this again put the UK in the middle of the range, and was one of the smallest losses of support. One reason for scepticism about the data is the famous 'propensity to vote' question. Responses that interviewees were 'certain' or 'probable' to vote were used as a predictor of the level of actual turnout: the UK percentage of 'certain + probable' was said to be 69% - hardly, in the light of events, the 'excellent indicator of voting propensity' claimed by Eurobarometre [28].

One might indeed point to the dismal level of turnout in the 1984 EP elections as a better indication of public opinion. But it may be replied that this in part reflects disillusion with exactly the shortcomings to which the Draft Treaty addresses itself; this too appears unconvincing.

The basic point is that most - even supposedly 'well-informed' - people in the UK have so far not even heard of the Draft Treaty; still fewer have the slightest notion of its content, status or modalities. And if these were conveyed to them in the form of such questions as 'Would you favour the ending of the UK veto?', or in terms of taxation powers, there is little doubt what the answers would be.

Conclusion

On present evidence, there is no prospect of the UK House of Commons voting in favour of the Draft Treaty in this Parliament. The likelihood of the House of Lords doing so is greater, but not much greater, than zero. The Prime Minister's personal opposition to such notions is legendary.

It is just conceivable that the issue could arise in the event of an inconclusive result at the next General Election. But this too is most unlikely. Only if one or both of the Alliance parties (improbably but successfully) made it a condition for participation in a pact with another party; or if, against present evidence, the Alliance parties were to make sweeping gains, might this happen. It is fair to point out that an extra 10%, say, of the popular vote would have produced such gains for the Alliance at the last election. It is fair to reply that even in an election whose outcome was in little doubt, that extra 10% failed to materialise.

PART III: PERSONAL ASSESSMENT

The attitude of the United Kingdom must seem, and indeed is, very discouraging. But the promoters of the Draft Treaty should perhaps bear three things in mind.

First, membership of the Community was "sold" to the British public primarily as an economic benefit. The political advantages of European integration were - perhaps wisely at the time - underplayed, except to sophisticated audiences. British accession was followed almost immediately by severe economic depression; and the problems of adapting to a completely new type of political and judicial system - "foreign" in every sense to British preconceptions and ways of working - were acute. The result is that the Community ideal has failed to capture the British imagination and, more fundamentally, that closer political integration is not seen as the natural development of the existing Communities.

Second, the fact that the United Kingdom does not have a written constitution, and seems to have no machinery for entrenchment of treaty obligations, is indicative of an important feature of the British temperament and outlook. There is little awareness of "the state" or its "institutions". Personal loyalty is more to the person of the monarch than to the monarchy as such. Most citizens are far more aware of the fact that they are English, Scottish or (despite partition) Irish than that they are British or that they are citizens of 'the United Kingdom' (which is hardly more than a term of art for the purposes of international relations). There is an innate preference for allowing institutions to develop, as the failure of all attempts radically to reform the second chamber of Parliament (the House of Lords) shows. The idea that important political ends can be achieved by creating new institutions, and the symbolic significance of creating them, are not regarded as self-evident.

Third, the British approach to legislation and, in the commercial field, to the making of contracts involves looking carefully at the "small print" and leaving as little to chance as possible. Every

foreseeable eventuality must be provided for in advance. There is therefore an inherent unwillingness to agree the principles and allow the details to look after themselves. The close attention already given by the U.K. government to the small print of the Draft Treaty is simply a natural instinct. And it has not gone unnoticed that, when politicians in other countries have expressed enthusiasm for the European Union, the small print of their speeches contains many of the same reservations on essential points.

We do not therefore find it surprising that the British attitude to this Draft Treaty, coming at this time, is negative. Indeed, we have serious reservations of our own, which we mention in a moment. We do, on the other hand, detect a growing awareness - at least amongst those who are directly involved - of the urgent importance of finding a way to make the Communities work better, and of the benefits that closer European integration can bring. The attitudes of the CBI and the Institute of Directors reported in Part II are particularly significant in this respect.

In support of the view that proposals for European Union could have the effect of diverting attention from the urgent task of making the existing Communities work better, it can be argued that the most significant step towards integration of the United States was neither the Declaration of Independence nor the framing of the Constitution, but the decision in the "Steamship Monopoly Case" (Gibbons -v- Ogden, 1824) when the Supreme Court first applied the Commerce Clause. In the Community we have, as it were, started with the Commerce Clause. If the existing Communities and their institutions are capable of being made to work, the practical benefits seen to be produced by them would lead naturally to greater enthusiasm for the next step towards European Union. At this stage, the European Union could simply be a new and unwelcome apple of discord.

For our own part, we are particularly concerned about four features of the Draft Treaty:-

- (i) The proposed constitution of the Court of Justice of the European Union, and the exercise of judicial control;
- (ii) The proposed constitution of the legislature and, specifically, the proposal for a unicameral Parliament;
- (iii) The extent to which the Draft Treaty provides for the effective exercise of executive power.
- (iv) The droits acquis of non-acceding Member States.

THE COURT OF JUSTICE

The Court of Justice (like the Supreme Court of the United States) has made a spectacular contribution to the process of European integration. One of the reasons why it has been able to do so has been that the objects of the Communities are, in important respects, both limited and clearly defined by the Treaties. In particular, the EEC Treaty sets out with some precision the ends to be achieved and, expressly or by implication, the social and economic theory underlying these prescriptions.

The specific prescriptions of the existing Treaties, the doctrine of direct effect and the machinery of Article 177 have all made it possible for the Court to treat what are essentially social and economic issues as legal issues. Further, the Court has been able, on the basis of the Treaties, to define with some precision the line of demarcation between the competences of the Communities and those of the Member States. We must, however, question whether this dynamic role of the Court would have been tolerable, in British eyes at least, if the jurisdiction of the Court had not itself been limited by the scope of the Treaties.

The Draft Treaty offers no clear definition of the jurisdiction of the Court, of the ends to be achieved or of the underlying social and economic theory. It is, at any rate, not clear to us which of the "Principles" of the EEC Treaty (far less the detailed rules of

later Articles) are to be regarded as "expressly or implicitly amended by this Treaty" (EUT Art.7(2)). To what extent, for example, could the legislative organs of the European Union lawfully adopt a dirigiste competition policy in place of the existing free market policy, permit restrictive trading agreements or encourage the creation of public or private cartels or monopolies ?

The choice between a regulated economy and a free market economy is clearly a political choice about which, as is evident, the governments of Member States may differ. Nevertheless, for the EEC, the choice has been made in the Treaty and the Court can give effect to the political choice by applying the Treaty. We do not, at the moment, see how the Court could do so if it had first to decide whether or not the political choice had in fact been made.

The difficulty would be all the greater if the Court were forced to decide between the interests of a majority of Member States which had ratified the Treaty for the European Union and those of a minority which had not. Suppose, for example, that a European Union consisting of seven of the existing Member States were to legislate in favour of greater state aids for ailing industries, abandoning the strict controls on state aids under the existing treaties; and suppose that this were seriously to affect the competitive position of undertakings in the non-acceding Member States who would (unless they are to be deprived of droits acquis) continue to be members, together with the acceding majority, of the existing Communities. Would the legislation of the European Union be lawful or not ?

It is not enough to say that this question would be decided by the Court of Justice in the light of all the Treaties, since the question then is "Which Court of Justice ?" Article 30 of the Draft Treaty provides for the reconstitution of the Court of Justice of the Communities under an organic law of the European Union, and for the appointment of at least half of its members by the Parliament. That being so, the Court of Justice of the

European Union cannot be the same as the Court of Justice of the Communities. Would the Court of Justice of the Communities continue to exist ? If so, how would a conflict between that Court and the new Court of the European Union be resolved ?

We offer this example, not as a juridico-philosophical conundrum, but because it seems to us to be a serious possibility that a minority of the existing Member States would not be prepared to ratify the Draft Treaty. The problems created by such a situation are problems which, in our opinion, the promoters of the Draft Treaty must face.

Further, even if all the existing Member States were to ratify the Draft Treaty, one must ask whether, given the extensive competence of the legislative organs of the European Union, the Court of Justice could continue to exercise the same sort of judicial control as it exercises at present. As Professor Jacqu  has pointed out in his General Report to the recent FIDE Congress on "The Principle of Equality in Economic Law" (page 16), judicial control presents less difficulty in the context of comp tence li e than where a wide margin of appreciation is left to the administration. While the point is not precisely the same, there is already some evidence that, as the application of the existing Treaties proceeds further into the margin of appreciation, the Court finds it increasingly difficult to be "adventurous". One of the reasons, we would suggest, is that judicial control must, if it is to be acceptable, itself be controlled.

THE PARLIAMENT

The Parliament envisaged in the Draft Treaty is a unicameral Parliament, and it is proposed that it should have legislative powers. A bicameral legislature is characteristic of federal constitutions, and experience shows that a second Chamber can play a valuable role in preserving the precarious equilibrium of federal structures.

It has been suggested that a bicameral legislature is achieved for the European Union by sharing the legislative function between the Parliament and the Council - the Parliament being the Lower Chamber (or popular assembly) whose will should ultimately prevail, and the Council the Upper Chamber representing the "regions" or "provinces" (the Member States). It seems to us, however, that the suggested analogy between the legislative system proposed in the Draft Treaty and existing bicameral legislatures is unsound for three reasons.

First, although Article 14 of the Draft Treaty purports to make the Parliament a popular assembly of the traditional type, its composition is left to be determined later. In the meanwhile, "the procedure [for its election] shall be that for the election of the Parliament of the European Communities". The structure of the existing Parliament is related only indirectly to the distribution of population and is weighted in favour of the smaller Member States. The Draft Treaty offers no guarantee of change in this respect and it is most unlikely that the smaller Member States would consent to removal of the weighting in their favour. This is all the more improbable because Article 22 of the Draft Treaty provides for voting in Council to be weighted, as at present, in favour of the larger Member States. "Regional" weighting in both Chambers of the legislature and, in particular, weighting in favour of the smaller and less powerful regions in the Lower Chamber, and in favour of the larger and more powerful regions in the Upper, is not found in any other bicameral system known to us.

Second, the Council is, by its nature, representative of government - of executive power. The interests of the executive organs of government are not necessarily, and certainly not always, identical with the interests of the legislator. This does not become any the less true where the executive of the Member States is given a legislative function within the wider context of the Community, as experience has shown. In some bicameral systems the members of the Upper Chamber are nominated or appointed by the executive (e.g. Canada and, to a large extent de facto, the United Kingdom), but this is wholly different from a system in which the executive itself performs the legislative function of the Upper Chamber.

Third, the Council does not represent the "regions" or "provinces" of the Community. It represents the central governments of ten or twelve nation states as they happen to exist in the late twentieth century after more than a millennium of historical development. Some states can be said to represent a single "people" or at least a virtually indissoluble union of peoples; others are much more fissile. In some states government has become highly centralised and is frequently criticised for being insensitive to the claims of the regions; in others a careful balance between the conflicting claims of the regions is maintained, either formally or by convention, by the constitutional system. There is, at most, a limited value in comparisons between the nation states of Europe and the states or provinces of the United States, Australia or even Canada (probably the closest analogy). The European situation, historically and in other respects, is infinitely more complex.

We therefore suggest that it is not possible, even theoretically, to justify the legislative system proposed in the Draft Treaty by analogy with existing bicameral systems. The fact that the system proposed in the Draft Treaty is different does not, of course, necessarily mean that it is a bad system. In any event, any proposal for European Union must, if it is to stand any chance of success, recognise the claims to sovereignty of the European nation states as they exist. For that reason, if for no other, there must be a body such as the Council having some power in relation to legislation. But if the purpose of European Union is to move towards an Europe des peuples, it seems surprising that the system proposed in the Draft Treaty would tend, if anything, to entrench l'Europe des états, since it does nothing to recognise the underlying diversity and aspirations of the "peoples" who live within the political map. Separatist movements already exist in several Member States and the system proposed in the Draft Treaty, so far from uniting peoples, might only serve to aggravate this trend.

In the case with which we are most familiar, we cannot believe that more than five million Scots would be prepared to accept a

situation in which they were able to elect only 8 members of the Lower Chamber and had to rely on central government in London to represent their interests in the Upper Chamber, while smaller countries had (actually and/or proportionately) much greater representation in the Lower Chamber and separate representation in the Upper Chamber. We are confident that other minorities would feel the same.

On the other hand, a truly bicameral Parliament, with weighting in favour of minorities in the Upper Chamber, could enhance the attraction of European Union to such minorities as well as introducing a potentially useful additional institution.

THE EXECUTIVE

As we understand it, the Draft Treaty presupposes that the Commission, deriving its mandate from the Parliament, would be capable of performing the functions assigned in other constitutions to the Executive. This appears to presuppose, in turn, that the sole function of the executive is to execute the will of the legislature. We suggest that this is not so.

It is an essential function of the executive to make political choices. Given the potentially vast range of competence of the European Union, the choices to be made would be numerous and, in many cases, urgent. Is it clear that a Commission enjoying no direct popular mandate would be capable, acceptably, of exercising such choices? We would suggest that, at any rate, it is not self-evident.

DROITS ACQUIS

The provisional view of British government sources (see Part II, Section 1) is that Article 82 of the Draft Treaty, which provides for the entry into force of the Treaty upon ratification by Member States representing two thirds of the population of the Community, would, if given effect, be contrary to international law. For our own part, we have, to put it at its lowest, grave misgivings about

the lawfulness of Article 82 - particularly since the existing Treaties contain express provision for amendment by common accord of the Member States (Arts. 236 EEC, 96 ECSC and 204 EAEC).

Whatever the lawfulness of the entry into force of the new Treaty without the common accord of the existing Member States and whatever the legal device adopted to achieve it [29], it seems to us to be clear, as a matter both of Community law and of international law, that the majority of the parties to the existing Treaties cannot, by entering into a new Treaty, deprive the minority of the droits acquis enjoyed by them under the existing Treaties. In the case of the Community treaties, this must be especially so since the Court in Van Gend en Loos has emphasised that the beneficiaries of the Community treaties are "peoples" and not just states. Any attempt by the majority to deprive the minority of droits acquis would therefore strike at the moral foundations of the Community and of Community law.

It may be suggested that the Draft Treaty seeks only to preserve and enhance the acquis communautaire; therefore the population of non-ratifying Member States will be deprived of nothing. But is it not equally arguable that the Draft Treaty offers a majority of the existing Member States the opportunity to appropriate to themselves the acquis communautaire to the detriment of the non-consenting minority ?

The answer to this question depends on how one defines the acquis communautaire. But we would suggest that it consists, not simply in such individual rights as the right of free movement, but in acceptance of the economic philosophy and the institutional framework enshrined in the existing Treaties. The example given above of a situation in which the European Union sought to alter the legislation on state aids seems to us to illustrate that the acquis communautaire does consist, at least in part, in the philosophical and institutional substructure of the existing Communities. It therefore seems to us to be unavoidable that unanimity in bringing about the European Union in the form proposed is a moral, as well as a legal imperative.

NOTES

1. See, for example, Rustomjee v. the Queen, (1876) 2 Q.B.D. 69, per Lord Coleridge, C.J., at 74 (CA). On the treaty making power and the Community treaties in particular, see Blackburn v. A-G [1971] 1 W.L.R. 1037; 2 All E.R. 1380; C.M.L.R. 784 (CA), and McWhirter v. A-G, [1972] C.M.L.R. 882 (CA).
2. Trendtex Trading Corp v. Central Bank of Nigeria, [1977] Q.B. 529; 1 All E.R. 881 (CA). cf. the earlier doctrine as enunciated by Lord Atkin in Chung Chi Cheung v. The King [1939] A.C. 160 at 167 (PC): "...so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law."
3. A-G Canada v. A-G Ontario (Labour Conventions), [1937] A.C. 326 at 347-8 (PC).
4. A.V.Dicey, The Law of the Constitution (10th ed.), 1965. pp. 88-91.
5. 20 & 21 Eliz. II, c. 68.
6. English Law - The New Dimension, 1974. p. 15.
7. See, for example, H.W.R. Wade, Constitutional Fundamentals, 1980. pp. 22-40; Frank Stacey, A New Bill of Rights for Britain 1973.
8. Macarthys Ltd. v. Smith [1979] 3 All E.R. 325 at 329; 3 C.M.L.R. 44 at 47 (CA).
9. Garland v. British Rail Engineering Ltd., [1983] 2 A.C. 751 at 771.

10. See A-G New South Wales v. Trethowan, [1932] A.C. 526 (PC); Harris v. Minister of the Interior, [1952] 2 S.A.L.R. 428 (SC); Bribery Commissioner v. Ranasinghe, [1965] A.C. 192 (PC); but cf. Kashavananda v. State of Kerala, [1973] 1 S.C.R. 231 (Indian SC).

11. See, for example, Dicey, op. cit., pp. 64-70; Wade, "The Basis of Legal Sovereignty", 1955 Camb.L.J. 172. See also Ellen Street Estates v. Minister of Health, [1934] 1 K.B. 590. The traditional view of Parliamentary sovereignty was most recently upheld in Manuel v. Attorney-General, [1983] Ch. 77. The case concerned the competence of Parliament in the patriation of the Canadian constitution, and was not directly concerned with the validity of a manner and form restraint. In the course of his judgment Sir Robert Megarry, V.-C., said (at p. 86), "If I leave on one side the European Communities Act 1972 and all that flows from it, and also the Parliament Acts 1911 and 1949, which do not affect this case, I am bound to say that from first to last I have heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be ultra vires. Of course there may be questions about what the Act means, and of course there is power to hold statutory instruments and other subordinate legislation ultra vires. But once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity".

12. Answer to Mr Proctor, Hansard 27/6/84, col.988

13. Answer to Mr Body, Hansard 14/5/84, col. 1.

14. Answer to Mr Lofthouse, Hansard 21/3/84, col. 452.

15. Speech by Mr Rifkind to Scottish CBI members, Dundee, 23/9/83.

16. Budge et al., The New British Political System, 1983, p. 139.

17. Letter to The Times 12/6/84.

18. EP Debates, No. 1-309/32; 14/2/84.
19. Labour Manifesto, 9/3/84, pp. 31-32.
20. Alliance Manifesto, 'Let's Get Europe Working Together', 1984, pp. 24-26.
21. The Common Market: An Agenda for Jobs and Economic Growth.
22. P. Clough, 'European Union: an Impossible Dream?', The Times, 12/9/83.
23. The Guardian, 14/9/83.
24. Headline, The Guardian, 15/9/83.
25. The Times, 15/2/84.
26. 14 February 1984, p.3.
27. Eurobarometre, No. 20, Dec. 1983, pp. 46ff.
28. Ibid. p. 76.
29. It has been suggested, for example, that there might be a co-ordinated unilateral withdrawal of the ratifying Member States from the existing Communities before the entry into force of the Draft Treaty. The issues raised by Article 82 of the Draft Treaty are discussed in another paper presented to the Conference: see J.H.H. Weiler and J. Modrall, "An Outline of the Transition from the Treaties Establishing the European Communities to the Treaty Establishing the European Union: Comparative International and Constitutional Reflections".

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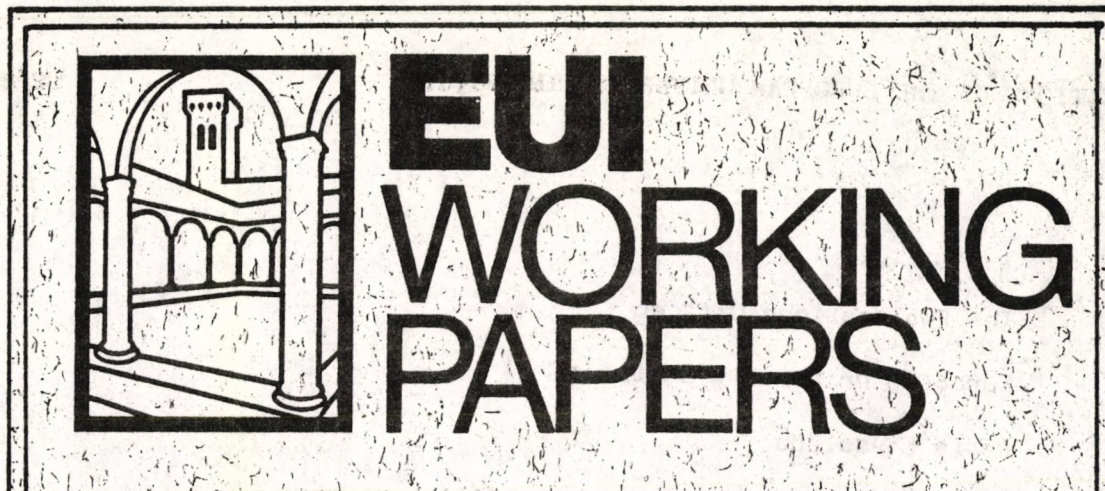
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